TESTIMONY OF PHIL GOLDBERG, ESQ.
ON BEHALF OF THE
AMERICAN LEGISLATIVE EXCHANGE COUNCIL

IN SUPPORT OF HOUSE BILL 5851
INVOLVING ASBESTOS AND SILICA CLAIMS

BEFORE THE MICHIGAN
HOUSE COMMITTEE ON TORT REFORM

APRIL 25, 2006

TESTIMONY OF PHIL GOLDBERG, ESQ.
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AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Mr. Chairman and Members of the Committee, thank you for allowing me to testify on behalf of the American Legislative Exchange Council (ALEC) in support of H.B. 5851. ALEC is the nation's largest bipartisan membership association of state legislators, numbering over 2,400. I have worked with ALEC's Civil Justice Task Force and have written several articles on asbestos and silica litigation issues.[1] The goal of the Civil Justice Task Force is to restore fairness, predictability, and consistency to the civil justice system. ALEC's National Task Forces provide a forum for legislators and the private sector to discuss issues, develop policies, and draft model legislation. The core elements of H.B. 5851 (medical criteria, venue, and joinder reform) are generally consistent with ALEC's model Asbestos and Silica Claims Priorities Act.

I. THE NEED FOR ASBESTOS AND SILICA LITIGATION REFORM

A. The Asbestos Litigation Crisis in a Nutshell

1. Mass Filings by the Unimpaired Claimants

The United States Supreme Court has said that this country is experiencing an "asbestos-litigation crisis." In one recent year, more than 100,000 new cases were filed. At least 322,000

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1 *See The Asbestos Litigation Crisis in a Nutshell*, The State Factor (Am. Legis. Exch. Council July 2004); *Asbestos Litigation: Momentum Builds for State-Based Medical Criteria Solutions to Address Filings by the Non-Sick*, 20:6 Mealey's Litig. Rep.: Asbestos 33 (Apr. 13, 2005); *Asbestos X-rays: Study Points To Abuse*, Nat'l L.J., Nov. 1, 2004, at 19.

asbestos claims are now pending. The litigation may cost up to $195 *billion* – on top of the $70 billion spent through 2002.

Recent studies have shown that up to ninety percent of the claimants who file asbestos claims today have no impairment. The RAND Institute for Civil Justice (RAND) recently concluded that "a large and growing proportion of the claims entering the system in recent years were submitted by individuals who had not at the time of filing suffered an injury that had as yet affected their ability to perform the activities of daily living." Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said, "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by unimpaired claimants.

According to former U.S. Attorney General Griffin Bell, mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." These screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. As Senior U.S. District Court Judge Jack Weinstein and Bankruptcy Court Judge Burton Lifland have explained: "Claimants today are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media."

U.S. News & World Report has described the claimant recruitment process: "To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving

law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'"

The practice of mass litigation screenings has come under significant scrutiny. As Attorney General Bell has pointed out, "screenings often do not comply with federal or state health or safety law. There often is no medical purpose for these screenings and claimants receive no medical follow-up." Senior U.S. District Judge John Fullam recently wrote that many X-ray interpreters (called B Readers) hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable."

The American Bar Association Commission on Asbestos Litigation (Commission) studied this problem with the assistance of the American Medical Association. The Commission confirmed that unimpaired claims generally arise from for-profit screening companies whose sole purpose is to identify large numbers of people with minimal X-ray changes "consistent with" prior asbestos exposure as the pretext for lawsuits: "Some X-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars – in some cases, millions – in the aggregate by the litigation screening companies due to the volume of films read." The Commission also reported that the rate of "positive" findings (*i.e.*, findings consistent with prior asbestos exposure) generated by litigation screening companies is "startlingly high," often exceeding fifty percent and sometimes reaching ninety percent.

Most recently, researchers at Johns Hopkins University compared the X-ray interpretations of B Readers employed by asbestos plaintiffs' counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the X-ray origins. The

study found that while B Readers hired by plaintiffs' lawyers claimed asbestos-related lung abnormalities in 95.9% of the X-rays, independent B Readers found such abnormalities in only 4.5% of the same X-rays – a difference it termed "too great to be attributed to inter-observer variability."

Dr. Lawrence Martin has explained the reason plaintiffs' B Readers seem to see asbestos-related lung abnormalities on chest X-rays in numbers not seen by neutral experts: "the chest X-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf." Some attorneys reportedly even pass an X-ray around to numerous radiologists until they find one who is willing to say that the X-ray shows symptoms of an asbestos-related disease - a practice strongly suggesting unreliable scientific evidence. The result, according to Dr. Andrew Ghio, is an "epidemic of asbestosis observed . . . in numbers which are inconceivable and among industries where the disease has never been previously recognized by medical investigation."

2. The Impact of Unimpaired Claimants on Asbestos Litigation

a. The Truly Sick

Mass filings by unimpaired claimants have created judicial backlogs and are exhausting scarce resources that should go to sick people and their families. Senior U.S. District Judge Charles Weiner explained this problem: "Oftentimes, [asbestos] suits are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims."

Cancer victims now have a well-founded fear that they may not receive adequate or timely compensation unless trends in the litigation are addressed. For example, consider Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company's bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990 and did not resume until 1995. According to the Manville trustees, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants – many with no discernible asbestos-related physical impairment whatsoever." The Trust is now paying out just *five cents on the dollar* to asbestos claimants. The trusts created through the Celotex and Eagle-Picher bankruptcies have similarly reduced payments to claimants.

For these reasons, lawyers in other states who represent cancer victims have been highly critical of unimpaired claimant filings and have endorsed mechanisms to give trial priority to the truly sick. Here is what some of these lawyers have said:

- ✓ Randy Bono, a prominent Madison County, Illinois attorney: "I welcome change. Getting people who aren't sick out of the system, that's a good idea."
- ✓ Terrence Lavin, a former Illinois State Bar President and Chicago plaintiffs' lawyer: "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an X-ray."
- ✓ Matthew Bergman, Seattle plaintiffs' lawyer: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system. . . . [T]he genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."
- ✓ Peter Kraus, Dallas plaintiffs' lawyer: Plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."
- ✓ Mark Iola of the same Dallas firm has said that unimpaired asbestos claimants are "stealing money from the very sick."
- ✓ Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated.

b. Bankruptcies and the Economic Impact of Asbestos Litigation

Claims filed by the unimpaired have contributed to forcing at least seventy-eight employers into bankruptcy. The bankruptcy process is accelerating due to the "piling on" nature of asbestos liabilities. For instance, RAND found: "Following 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades." The large number of major employers that have declared bankruptcy as a result of asbestos litigation reinforces the concern that, unless something is done, sick claimants may face a depleted pool of assets in the future.

Moreover, as the Enron collapse illustrated, bankruptcies represent more than the demise of a business. They can cost employees their jobs and ordinary citizens their retirement savings, as well as have a deep impact on entire communities.

A study by Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues on the direct impact of asbestos bankruptcies on workers found that bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000. Those workers and their families lost up to $200 million in wages, and employee retirement assets declined roughly twenty-five percent. Another study, which was prepared by National Economic Research Associates, found that workers, communities, and taxpayers will bear as much as $2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. For every ten jobs lost directly, the community may lose eight additional

jobs. The shutting of plants and job cuts decrease per capita income, leading to declining real estate values, and lower tax receipts.

c. Peripheral Defendants Are Being Dragged into the Litigation

Now, more companies are being ensnarled in the litigation as a result of the large number of asbestos-related bankruptcy filings. One plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *The Wall Street Journal* has reported "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." The number of asbestos defendants now includes over 8,500 companies, affecting many small and medium-size companies in industries that cover eighty-five percent of the economy. According to RAND, non-traditional defendants now account for more than half of asbestos expenditures.

B. A Sudden Rise in Silica Litigation

Recently, some asbestos personal injury lawyers have begun to use mass screenings to recruit plaintiffs to file claims alleging exposure to silica. Silica is present in sand, gravel, soil, and rocks – things found in children's playgrounds. In its natural form, silica is not harmful, but when fragmented into tiny particles (such as through abrasive blasting, in foundry operations, or through road construction and repair, and other construction activities), silica can be dangerous if inhaled.

In many instances, plaintiffs' lawyers have filed claims against both asbestos and silica defendants, although leading medical experts agree that it is a medical rarity for someone to have both an asbestos-related and a silica-related impairment. In June 2005, U.S. District Court Judge

Janis Graham Jack of the Southern District of Texas issued a scathing opinion in which she recommended that all but one of the 10,000 silica claims centralized into a federal multi-district litigation should be dismissed on remand because the diagnoses were fraudulently prepared. "[T]hese diagnoses were driven by neither health nor justice," Judge Jack said in her opinion. "[T]hey were manufactured for money." (*See* Exhibit A). The view that much of the new silica litigation appears to be lawyer-driven is supported by federal government reports finding that silicosis-related deaths have declined dramatically. (*See* Exhibit B).

C. State Legislatures Are Responding to These Problems

In response to these problems, state legislatures are acting to address filings by unimpaired asbestos and silica claimants. In 2004, Ohio became the first state to pass legislation requiring plaintiffs to demonstrate physical impairment in order to bring or maintain an asbestos-related action. Ohio also passed medical criteria legislation to help ensure that silica filings would not be exacerbated by plaintiffs' lawyers who might be discouraged from bringing weak or meritless asbestos suits under the asbestos medical criteria law. In 2005, Georgia, Florida, and Texas enacted medical criteria laws for asbestos and silica claims. Kansas and South Carolina may enact similar reforms this month.

Medical criteria reform laws, such as H.B. 5851, have received the support of the National Association of Insurance Commissioners and National Conference of Insurance Legislators. They also find support in reforms adopted by several state courts, the ALEC model legislation, and an American Bar Association resolution calling for the enactment of federal asbestos medical criteria legislation.

II. ASBESTOS LITIGATION IN MICHIGAN: REFORM IS NEEDED

Like other states, Michigan has witnessed a dramatic increase in asbestos filings. For example, the number of number of pending cases in Wayne County jumped from 550 in 1999 to approximately 1500 at the end of 2002. In 2003, Michigan ranked seventh among the states in asbestos claims paid and eighth in the amount of payments according to date from the Manville Trust. In fact, since 2001, according to an industry source, an average 1,150 new claims have been filed in Michigan each year. Further, reports before this Legislature have shown that in 2006, more than 450 cases are scheduled for trial with a similar number already scheduled for trial in 2007. The vast majority of claimants generally have little or no physical impairment.

Moreover, some of the largest employers in Michigan are falling victim to the new wave of asbestos litigation. *See, e.g.,* Mark Truby, *Asbestos Suits Haunt Carmakers,* Detroit News, Mar. 31, 2002, at A1. As a result, the Michigan workers and retirees who rely on those companies for their livelihood and retirement security are losing their jobs and their savings. Most notably, Southfield-based Federal Mogul, which employed 52,000 workers, was forced to seek the protection of the bankruptcy courts after acquiring a British auto parts company that previously had a narrow connection with asbestos liability. *See* Tom Walsh, *More Firms Tangled in Ties To Asbestos*, Detroit Free Press, Jan. 24, 2003. Federal Mogul's asbestos claims went from $89 million in 1998 to $351 million in 2000, "with no end in sight." *Id.* The company's shares fell from $65 per share in 1998 to 45 cents per share in October 2001. *See* Jamie Butters, *Asbestos Suits Bankrupt Another: Federal-Mogul; Auto Supplier Says It Won't Cut Jobs, Shut Plants*, Detroit Free Press, Oct. 2, 2001. "[S]ome of the biggest corporations in

Michigan are worried they could be next." Rick Haglund, *Asbestos Threat Hangs Over Business,* Grand Rapids Press, Dec. 4, 2002.

In addition, "[t]he big business of asbestos litigation is encroaching upon the livelihood of Michigan's small businesses," which typically includes "a staggering number of hardware stores, construction-related businesses, car repair shops, not to mention plumbers and various other trades." Karen Kerrigan, Editorial, *Asbestos Suits Imperil Small Michigan Firms*, Detroit Free Press, Nov. 3, 2002.

The toll of the litigation on Michigan defendants led one local newspaper to editorialize: "Those who are genuinely ill should be given compensation. But to drive healthy companies into bankruptcy, including some of Metro Detroit's major employers, serves no one, except a small number of aggressive litigators." Editorial, *Don't Let Asbestos Cases Bankrupt Automakers*, Detroit Free Press, Mar. 31, 2003.

Former Detroit Mayor Dennis Archer has cited his knowledge of the devastation asbestos litigation has caused within Michigan as a reason he was involved in an American Bar Association resolution calling for "medical standards to differentiate between people who are seriously sick and those who are not." Tom Walsh, *Archer Fights Exploitative Asbestos Suits*, Detroit Free Press, Feb. 13, 2003.

III. H.B. 5851 - THE ASBESTOS AND SILICA CLAIMS PRIORITIES ACT

Under H.B. 5851, sick claimants would receive priority and would no longer be forced to wait behind earlier-filing unimpaired claimants. Individuals who cannot demonstrate asbestos-related or silica-related impairment under objective fair criteria recognized by the medical

community would have their claims preserved, and could bring them later, when they discover or should have discovered the existence of an impairing condition caused by asbestos or silica. These provisions would apply only to civil actions alleging asbestos or silica claims; they would not impact claims in the worker compensation system. In addition, the legislation would stop the improper joinder of dissimilar asbestos or silica claims. The bill also would provide sound venue requirements for asbestos and silica claimants. Below is a summary of the core provisions of H.B. 5851 that are consistent with provisions in the ALEC Model bill.

A. Plaintiffs Must Be Sick To Sue, or Their Claim Will Be Tolled and Preserved

The general rule stated in the bill is that only people who are physically impaired from exposure to asbestos or silica can bring an asbestos or silica claim. The diagnosis of disease must come from a "real doctor" treating a "patient," just like normal medicine is practiced. Statutes of limitations would be tolled for claimants who have no present physical impairment, as long as those claims were not barred as of the Act's effective date. The statute of limitations would not begin to run until a person knows or should have discovered the existence of an impairing condition.

To proceed with a claim for an asbestos-related nonmalignant condition, a claimant would have to present the following basic core of evidence: (1) evidence that a qualified physician has made a diagnosis of a nonmalignant condition for which exposure to asbestos was a substantial contributing factor; (2) evidence that the diagnosing physician has taken an occupational, exposure, medical and smoking history of the exposed person to help ensure that the claimed condition is asbestos-related; (3) evidence that the exposed person has a permanent

respiratory impairment; (4) radiological or pathological evidence of asbestosis or radiological evidence of diffuse pleural thickening; and (5) pulmonary function tests indicating lung function impairment.

Claimants alleging asbestos-related lung cancer would need to present evidence that a qualified physician has made a diagnosis of lung cancer for which exposure to asbestos was a substantial contributing factor; a sufficient latency period between the date of exposure and the date of diagnosis; for nonsmokers, radiological or pathological evidence of asbestosis or evidence of occupational asbestos exposure for certain defined minimum periods that vary depending on the job the person performed; and for smokers, radiological or pathological evidence of asbestosis and evidence of occupational asbestos exposure for the defined minimum periods set forth in the bill for various job descriptions.

Claimants alleging other asbestos-related cancers, other than mesothelioma, would need to present evidence that a qualified physician has made a diagnosis of a primary cancer for which exposure to asbestos was a substantial contributing factor; a sufficient latency period between the date of exposure and the date of diagnosis; and radiological or pathological evidence of asbestosis and/or evidence of occupational asbestos exposure for certain defined minimum periods to help establish that the cancer was asbestos-related.

There are no prima facie requirements for mesothelioma claimants.

To proceed with a claim for silica-related impairment, other than cancer, a claimant must present: (1) evidence that a qualified physician has made a diagnosis of a condition for which exposure to silica was a substantial contributing factor; (2) evidence that the diagnosing

physician has taken an occupational, exposure, medical and smoking history of the exposed person to help ensure that the claimed condition is silica-related; (3) evidence that the exposed person has a permanent respiratory impairment; and (4) radiological or pathological evidence of silicosis.

Claimants alleging silica-related lung cancer would need to present evidence that a qualified physician has made a diagnosis of lung cancer for which exposure to silica was a substantial contributing factor; evidence that the diagnosing physician has taken an occupational, exposure, medical and smoking history of the exposed person to help ensure that the claimed condition is silica-related; and radiological or pathological evidence of silicosis.

B. Joinder of Plaintiffs Is Reserved for Proper Circumstances

H.B. 5851 provides that courts may not consolidate claims seeking to recover for injuries allegedly caused by asbestos and silica unless the parties are in the same household. This strengthens the current permissive joinder rule that allows joinder of plaintiffs if their claims arise out of the same transaction or occurrence. *See* MCR 2.203 (2006).

The stronger provision of H.B. 5851 is necessary to ensure that claimants and defendants receive individualized justice rather than being part of a courtroom Cuisinart. Some courts that have been inundated with asbestos and silica claims have tried judicial shortcuts to move the dockets at a faster pace. One technique particularly unfair to the litigants is to join disparate claims for trial, either in mass consolidations or in clusters. For example, it has been reported to this Legislature that in Wayne County, cases have been consolidated into trial groups of a hundred. People with serious illnesses are often lumped together with claimants having no

illness at all. Defendants have no real ability to defend the cases, and are forced to settle, regardless of the merits of the individualized claims.

Ironically, even well intended consolidations have turned out to be fool's gold. Instead of clearing dockets, mass consolidations actually invite the filing of more claims. As mass tort expert Francis McGovern of Duke Law School has explained:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high-resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

One West Virginia trial court judge involved in that state's litigation ruefully acknowledged this fact. He said, "I will admit that we thought that [a mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases." Plaintiffs should only be able to join in asbestos and silica cases if they are members of the same household. This rule will ensure that claims are properly adjudicated.

C. Cases May Only Be Brought In Appropriate Venues

Forum shopping is a problem in asbestos and silica litigation because different states, and different jurisdictions within states, treat claims in different ways. Rather than file cases where there is a logical connection to an injury, plaintiff lawyers often strategically file cases in certain jurisdictions with reputations for producing large settlements and verdicts.

H.B. 5851 stops people with claims more properly heard in other states from filing their asbestos-related and silica-related claims in Michigan courts. Under the bill, asbestos-related and silica-related claims may only be brought in Michigan if the plaintiff is domiciled in

Michigan or the exposure to asbestos or silica that is a substantial contributing factor to the physical impairment on which the claim is based occurred in Michigan.

Similar venue reform legislation has been enacted in Alabama, Florida, Mississippi, South Carolina, Texas, and West Virginia, among other states.

CONCLUSION

Reforms similar to H.B. 5851 have been enacted in Ohio, Texas, Georgia and Florida, with Kansas and South Carolina very likely to join the list very soon. By adopting H.B. 5851, Michigan would join the list of forward thinking states that have recognized the importance of promoting sound public policy in asbestos and silica litigation.

State Legislation/Court Orders To Address Unimpaired Asbestos Claimant Filings

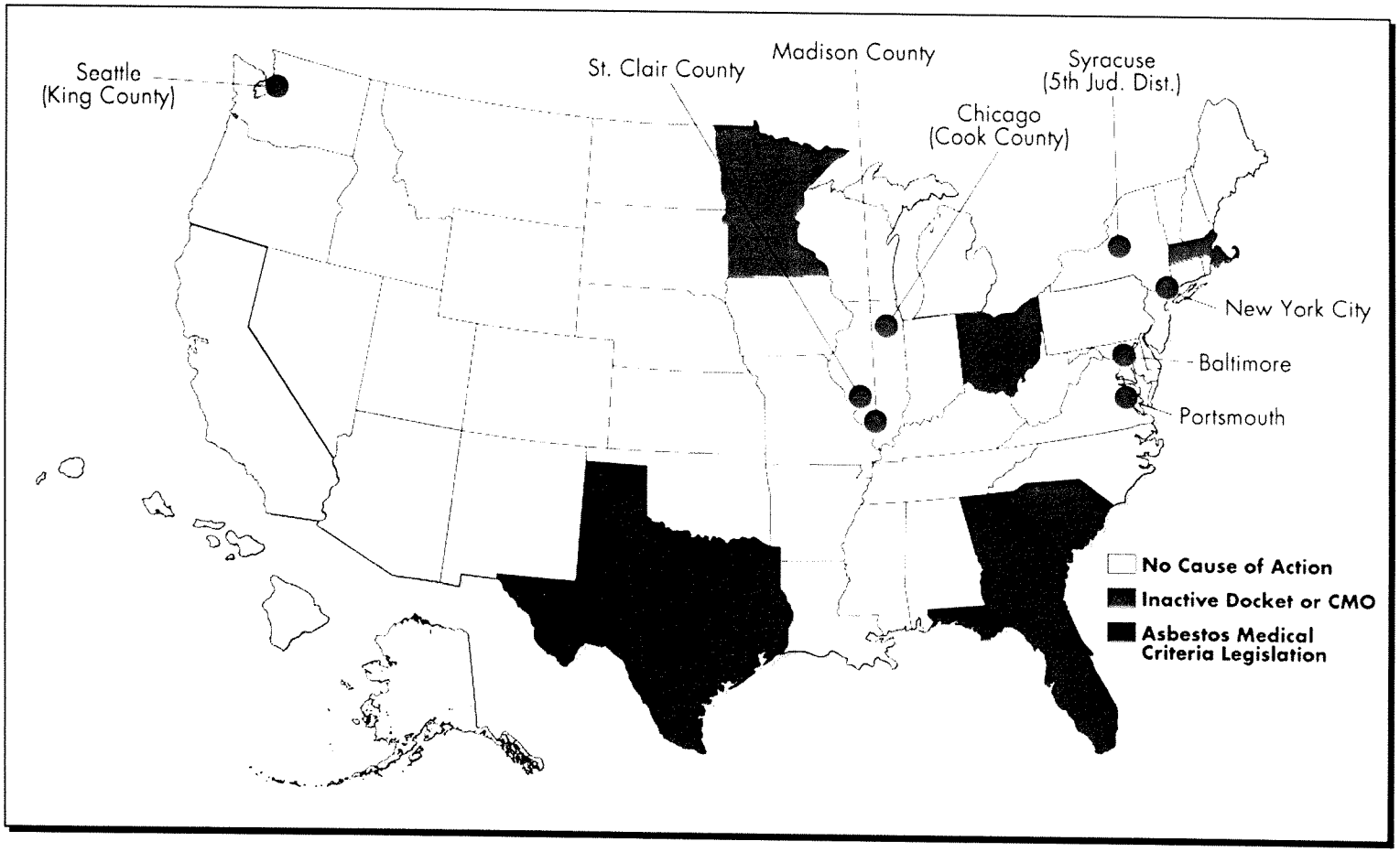
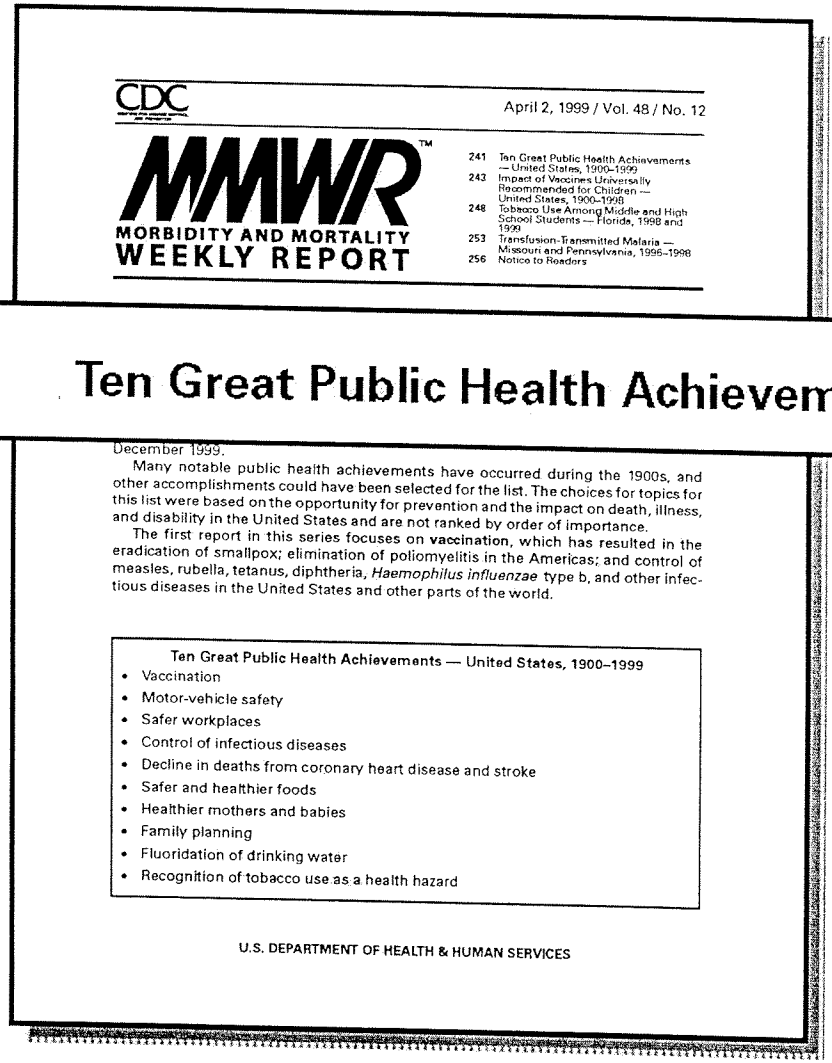


EXHIBIT A

Occupational disease reduced



CDC

April 2, 1999 / Vol. 48 / No. 12

MMWR™

MORBIDITY AND MORTALITY WEEKLY REPORT

December 1999.

Many notable public health achievements have occurred during the 1900s, and other accomplishments could have been selected for the list. The choices for topics for this list were based on the opportunity for prevention and the impact on death, illness, and disability in the United States and are not ranked by order of importance.

The first report in this series focuses on **vaccination**, which has resulted in the eradication of smallpox; elimination of poliomyelitis in the Americas; and control of measles, rubella, tetanus, diphtheria, *Haemophilus influenzae* type b, and other infectious diseases in the United States and other parts of the world.

Ten Great Public Health Achievements — United States, 1900–1999

- Vaccination
- Motor-vehicle safety
- Safer workplaces
- Control of infectious diseases
- Decline in deaths from coronary heart disease and stroke
- Safer and healthier foods
- Healthier mothers and babies
- Family planning
- Fluoridation of drinking water
- Recognition of tobacco use as a health hazard

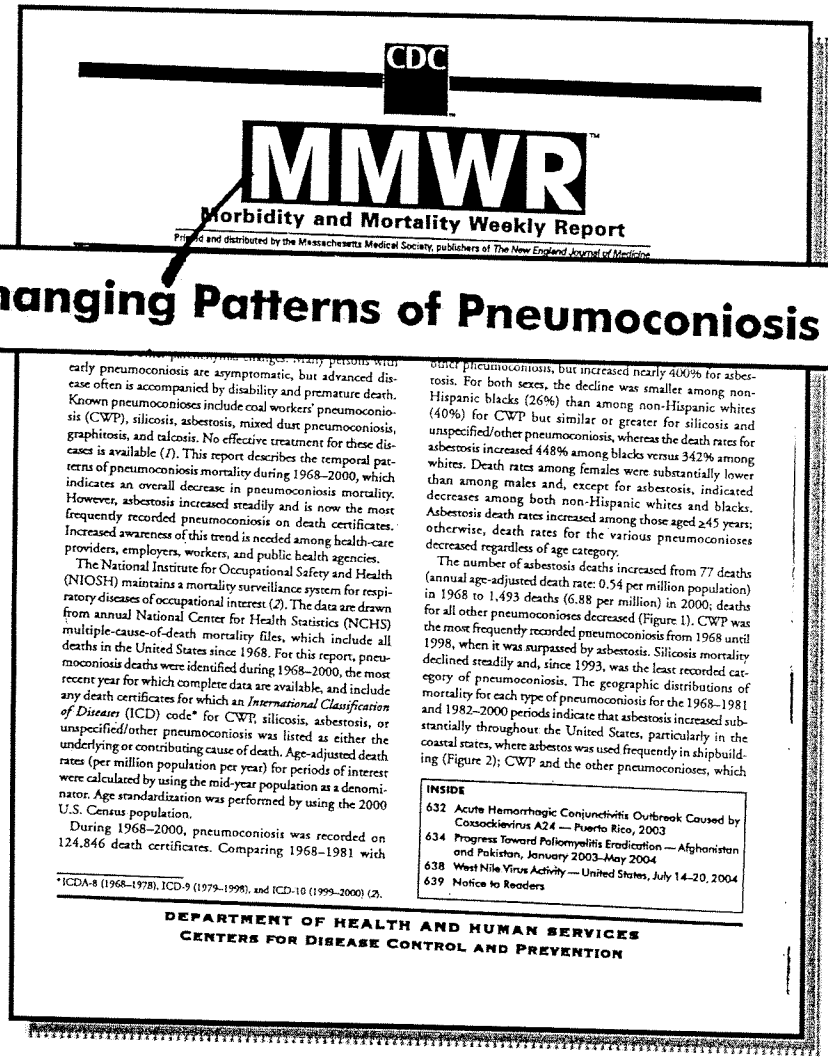
U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES

Ten Great Public Health Achievements — United States, 1900–1999

Centers for Disease Control – April 1999:

"Work-related health problems, such as … silicosis – common at the beginning of the century – have come under better control."

Silicosis mortality has decreased



CDC

MMWR

Morbidity and Mortality Weekly Report

Prepared and distributed by the Massachusetts Medical Society, publishers of *The New England Journal of Medicine*

Changing Patterns of Pneumoconiosis Mortality — United States, 1968–2000

early pneumoconiosis are asymptomatic, but advanced disease often is accompanied by disability and premature death. Known pneumoconioses include coal workers' pneumoconiosis (CWP), silicosis, asbestosis, mixed dust pneumoconiosis, graphitosis, and talcosis. No effective treatment for these diseases is available (*1*). This report describes the temporal patterns of pneumoconiosis mortality during 1968–2000, which indicates an overall decrease in pneumoconiosis mortality. However, asbestosis increased steadily and is now the most frequently recorded pneumoconiosis on death certificates. Increased awareness of this trend is needed among health-care providers, employers, workers, and public health agencies.

The National Institute for Occupational Safety and Health (NIOSH) maintains a mortality surveillance system for respiratory diseases of occupational interest (*2*). The data are drawn from annual National Center for Health Statistics (NCHS) multiple-cause-of-death mortality files, which include all deaths in the United States since 1968. For this report, pneumoconiosis deaths were identified during 1968–2000, the most recent year for which complete data are available, and include any death certificates for which an *International Classification of Diseases* (ICD) code* for CWP, silicosis, asbestosis, or unspecified/other pneumoconiosis was listed as either the underlying or contributing cause of death. Age-adjusted death rates (per million population per year) for periods of interest were calculated by using the mid-year population as a denominator. Age standardization was performed by using the 2000 U.S. Census population.

During 1968–2000, pneumoconiosis was recorded on 124,846 death certificates. Comparing 1968–1981 with

*ICDA-8 (1968–1978), ICD-9 (1979–1998), and ICD-10 (1999–2000) (*3*).

other pneumoconiosis, but increased nearly 400% for asbestosis. For both sexes, the decline was smaller among non-Hispanic blacks (26%) than among non-Hispanic whites (40%) for CWP but similar or greater for silicosis and unspecified/other pneumoconiosis, whereas the death rates for asbestosis increased 448% among blacks versus 342% among whites. Death rates among females were substantially lower than among males and, except for asbestosis, indicated decreases among both non-Hispanic whites and blacks. Asbestosis death rates increased among those aged ≥45 years; otherwise, death rates for the various pneumoconioses decreased regardless of age category.

The number of asbestosis deaths increased from 77 deaths (annual age-adjusted death rate: 0.54 per million population) in 1968 to 1,493 deaths (6.88 per million) in 2000; deaths for all other pneumoconioses decreased (Figure 1). CWP was the most frequently recorded pneumoconiosis from 1968 until 1998, when it was surpassed by asbestosis. Silicosis mortality declined steadily and, since 1993, was the least recorded category of pneumoconiosis. The geographic distributions of mortality for each type of pneumoconiosis for the 1968–1981 and 1982–2000 periods indicate that asbestosis increased substantially throughout the United States, particularly in the coastal states, where asbestos was used frequently in shipbuilding (Figure 2); CWP and the other pneumoconioses, which

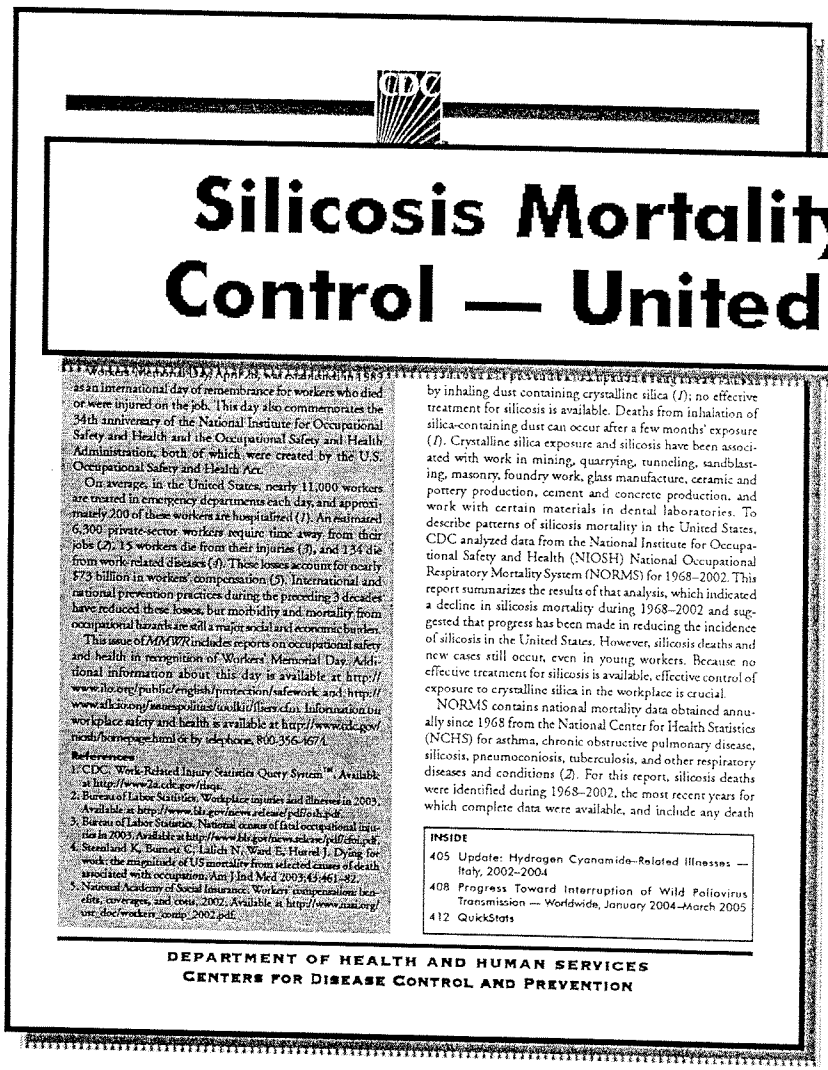
INSIDE

DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR DISEASE CONTROL AND PREVENTION

CDC – July 23, 2004:

- Reviewed data for all U.S. deaths between 1968 and 2000
- Compared 1968-1981 to 1982-2000
- Found 70% decrease in deaths from silicosis

CDC update – April 29, 2005



Silicosis Mortality, Prevention, and Control — United States, 1968–2002

as an international day of remembrance for workers who died or were injured on the job. This day also commemorates the 34th anniversary of the National Institute for Occupational Safety and Health and the Occupational Safety and Health Administration, both of which were created by the U.S. Occupational Safety and Health Act.

On average, in the United States, nearly 11,000 workers are treated in emergency departments each day, and approximately 200 of these workers are hospitalized (*1*). An estimated 6,300 private-sector workers require time away from their jobs (*2*), 15 workers die from their injuries (*3*), and 134 die from work-related diseases (*4*). These losses account for nearly $73 billion in workers' compensation (*5*). International and national prevention practices during the preceding 3 decades have reduced these losses, but morbidity and mortality from occupational hazards are still a major social and economic burden.

This issue of *MMWR* includes reports on occupational safety and health in recognition of Workers' Memorial Day. Additional information about this day is available at http://www.ilo.org/public/english/protection/safework and http://www.aflcio.org/issuespolitics/workplaceissues/osh. Information on workplace safety and health is available at http://www.cdc.gov/niosh/homepage.html or by telephone, 800-356-4674.

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by inhaling dust containing crystalline silica (*1*); no effective treatment for silicosis is available. Deaths from inhalation of silica-containing dust can occur after a few months' exposure (*1*). Crystalline silica exposure and silicosis have been associated with work in mining, quarrying, tunneling, sandblasting, masonry, foundry work, glass manufacture, ceramic and pottery production, cement and concrete production, and work with certain materials in dental laboratories. To describe patterns of silicosis mortality in the United States, CDC analyzed data from the National Institute for Occupational Safety and Health (NIOSH) National Occupational Respiratory Mortality System (NORMS) for 1968–2002. This report summarizes the results of that analysis, which indicated a decline in silicosis mortality during 1968–2002 and suggested that progress has been made in reducing the incidence of silicosis in the United States. However, silicosis deaths and new cases still occur, even in young workers. Because no effective treatment for silicosis is available, effective control of exposure to crystalline silica in the workplace is crucial.

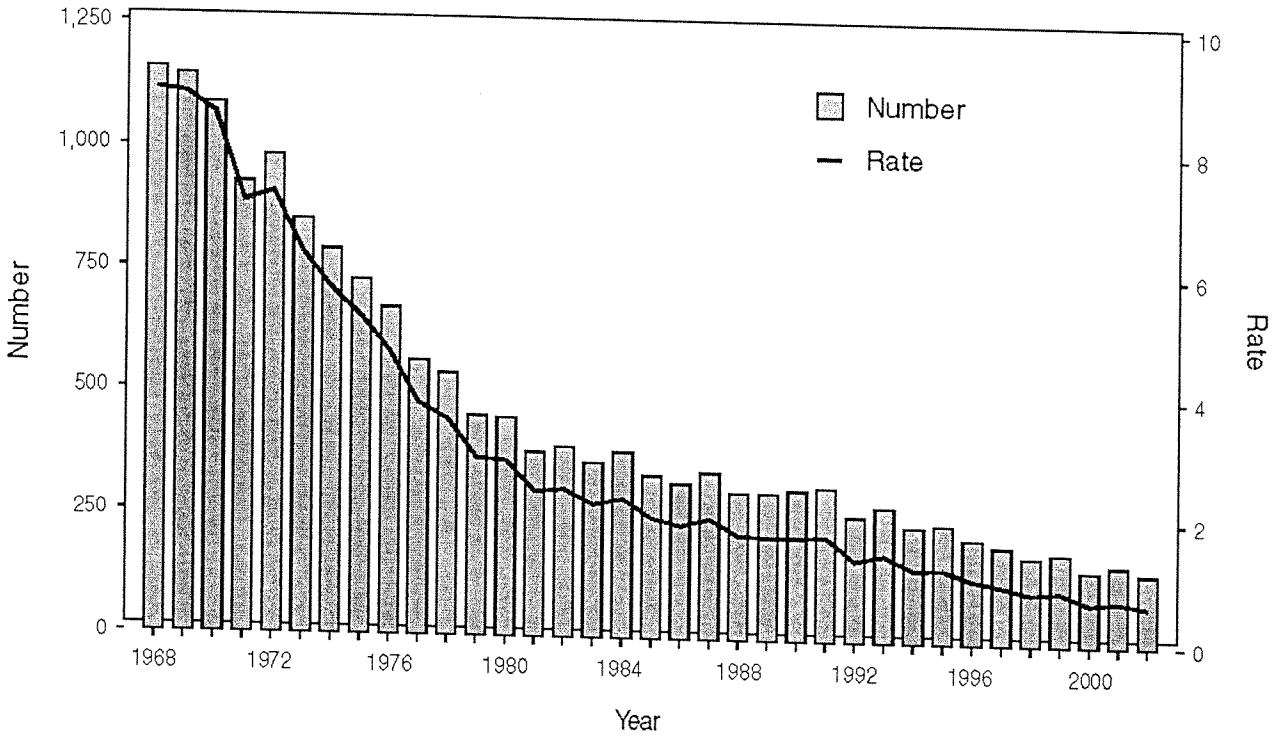
NORMS contains national mortality data obtained annually since 1968 from the National Center for Health Statistics (NCHS) for asthma, chronic obstructive pulmonary disease, silicosis, pneumoconiosis, tuberculosis, and other respiratory diseases and conditions (*2*). For this report, silicosis deaths were identified during 1968–2002, the most recent years for which complete data were available, and include any death

DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR DISEASE CONTROL AND PREVENTION

- Updated review – looked at data for all U.S. deaths between 1968 and 2002
- Found 93% decline in deaths from silicosis during this period

The trend since 1968 is clear

FIGURE 1. Number of silicosis deaths and age-adjusted mortality rate*, by year — National Occupational Respiratory Mortality System, United States, 1968–2002



* Per million persons aged ≥15 years.

Source: MMWR (April 29, 2005)

EXHIBIT B

Case of the Vanishing X-rays

The judicial undressing of the silicosis scam continues, and the lawyers are really starting to sweat under the kleig lights.

Back in June, federal Judge Janis Graham Jack disparaged nearly all of 10,000 claims for the rare lung disease as having been "manufactured for money." She also told the lawyers involved that federal prosecutors wanted access to the documents and X-rays surrounding this "fraud." So imagine Judge Jack's surprise to discover at a hearing last Monday that Houston attorney Scott Hooper—one of several tort lawyers who brought the claims—had removed more than 1,300 X-rays from a court depository. The judge had specifically denied Mr. Hooper's request to take the X-rays.

A trial lawyer admits that asbestos claims were phony.

Ms. Jack told Mr. Hooper that if he did not have the documents back in her court by 5 p.m., he'd be found in contempt and would be "held in this courtroom until they are replaced." When Mr. Hooper said that was impossible, she informed him that "If you have to hire a jet to get them here, you will get them here." She then ordered marshals to accompany him to make his calls.

The hapless Mr. Hooper offered all sorts of legal reasons he felt he had a right to the X-rays—including an assertion that the judge no longer had jurisdiction. But the main point is that Judge Jack had specifically informed everyone that the documents and X-rays were under federal scrutiny. That Mr. Hooper still took them away suggested he might be hiding something. By last Wednesday, Judge Jack had put out an order noting that Mr. Hooper had removed 1,342 X-rays from the depository but had only returned 1,219 by the end of Monday. She added: "In the future, the Court would like Mr. Hooper to form a closer relationship with the law."

The other excitement was an extraordinary exchange between Judge Jack and trial lawyer Richard Laminack. (We reprint part of it nearby.) The judge had remanded most of the bogus silicosis suits to state court, but she kept one—originally filed by Mr. Laminack's firm in her Texas jurisdiction. The "Alexander suit" includes about 100 plaintiffs who all claim to have silicosis. Yet Judge Jack's pretrial hearings helped discover that nearly 70% of these claimants had previously filed an asbestos claim. Experts testifying in Judge Jack's court had made clear that it is extremely rare for a person to have both asbestosis and silicosis.

When Judge Jack brought this troubling fact up again in last week's hearing, Mr. Laminack shocked everyone by explaining that he doubts his clients ever had asbestosis. Put another way, so eager was Mr. Laminack to support the credibility of his silicosis claims that he admitted in federal court that he believed his clients had previously filed *fraudulent asbestos claims*. His admission is all the more notable because Mr. Laminack was indicting some of the lions of the asbestos bar—Dickie Scruggs, for instance—who (according to defense attorneys) were among those filing "Alexander" asbestos claims.

And its impact is already rippling through the judicial system. A group of companies facing a silicosis lawsuit in Ohio recently filed a motion citing Judge Jack's findings and pointing out that more than half of the 1,750 plaintiffs in their case had also previously filed asbestos suits. These companies are requesting discovery into how this came to be, and let's hope the Ohio court agrees.

All of which is even more reason for Judge Jack, federal prosecutors and Congress to keep exposing the hundreds of thousands of sham asbestos and silicosis suits that are clogging U.S. courts.

Jack the Ripper

Editor's note: The following is an Aug. 22 courtroom exchange between federal Judge Janis Graham Jack and trial attorney Richard Laminack about how it is that so many of Mr. Laminack's silicosis plaintiffs had previously filed asbestos lawsuits. A related editorial appears nearby.

Judge Jack: And do you have the X-rays from the asbestosis claims? Do you have the medical reports from the asbestosis claims? These are your clients. They were supposed to have identified on their original Fact Sheet all of these diagnoses, but apparently failed to do so.

Now what you have here is 70-some-odd percent of your clients that have had both a diagnosis, according to you, of silicosis and asbestosis, which when I heard all the experts in February not a single expert had ever seen a combination of those two. Only plaintiffs' lawyers have seen them. Not a single physician that testified here had ever seen—they didn't rule out that it wasn't possible, but none of them had ever seen a case of asbestosis and silicosis combined. . . .

I assume that your experts that you've identified are going to explain why some 70% of your clients have both silicosis and asbestosis and how that could possibly have occurred, and I just need to give you fair warning about this because this stretches credibility.

Mr. Laminack: Your Honor, I understand and I don't like it, either. I want the court to know that. I have listened very carefully to everything you've said.

Judge Jack: I appreciate that.

Mr. Laminack: And I've heard your concerns. And—

Judge Jack: But those were February concerns and—

Mr. Laminack: I totally understand. And you bet my experts are going to explain that. I think the explanation on a lot of the cases is the asbestosis diagnosis is wrong.

Judge Jack: Well, that would be a shame, wouldn't it, that your clients made fraudulent claims in asbestosis and now those same people who made fraudulent claims are trying to make another pneumoconiosis claim here. It—that impacts their credulity tremendously.

I wonder, also, for each of the plaintiffs' lawyers that have these cases, if they have informed their clients once you acquired this diagnosis for your clients that they now have to forever have the diagnosis of a terminal disease, that they're obligated to tell their life insurance carriers. If they acquire new life insurance, if they change health insurance providers, that they have this disease. Do you think that they know this, Mr. Laminack?

Mr. Laminack: Your Honor, that's a very good point. I agree totally with what you're saying. . . . Obviously I don't want to go into what I talked to my clients about—

Judge Jack: I understand.

Mr. Laminack:—other than to say we have been very candid with our clients about these issues and the repercussions. And your Honor, I've got enough to do. I don't want to represent people that don't have legitimate cases. I don't want to do that. That's not my purpose in being here. All I know is at this point 87 of these Alexander plaintiffs have good, solid Daubert-proof diagnoses of silicosis. They've got it.

Judge Jack: And 70-some-odd percent of those also had apparently solid Daubert-proof asbestosis diagnoses. Did you print off the document for him?

Mr. Laminack: I doubt that.

Judge Jack: Pardon?

Mr. Laminack: I doubt that's true.

Judge Jack: About the asbestosis?

Mr. Laminack: Yes.

Judge Jack: And Mr. Laminack, you can speak on behalf of your clients about that?

Mr. Laminack: As I say, your Honor, I doubt that. I doubt the numbers, and I doubt the diagnosis.

Judge Jack: You doubt that they had claims, or you doubt that they actually had asbestosis?

Mr. Laminack: Both.

REVIEW & OUTLOOK

Silicosis, Inc.

It has taken more than 70 bankrupt companies and a clogged legal system for prosecutors to see that the asbestos and silicosis lawsuit machines are a racket, but better late than never. The U.S. Attorney for the Southern District of New York has now convened a grand jury, and documents we've reviewed that are part of that probe are eye-popping.

Some illuminating documents from the grand-jury probe.

A key figure is George Martindale, a doctor who in a Texas case had repudiated thousands of silicosis and asbestos diagnoses. New York prosecutors took an interest, and Dr. Martindale was subpoened in April. The documents he provided to the grand jury offer a tantalizing window on asbestos/silicosis litigation.

First, some medical background: In order to get an asbestosis or silicosis "diagnosis" (and thus be eligible to sue), a claimant must see a qualified doctor who establishes exposure to silica or asbestos, conducts a physical exam and pulmonary tests, and examines an X-ray. A second doctor, known as a B-reader, will sometimes also look at the X-ray as a check of that part of the evidence. The second reader does not provide an actual diagnosis.

According to Dr. Martindale, he had thought he was merely a B-reader. He says he was told by the screening company that hired him, N&M, that a doctor named Ray Harron (more on him later) had done all the hard work and that he would simply provide the second X-ray opinion. When Dr. Martindale started his job, he says he wrote his own conclusions. But not long thereafter, N&M asked him to sign a form-paragraph that included the words "the diagnosis of silicosis." Dr. Martindale says he believed this wording simply meant that he was agreeing with Dr. Harron's original X-ray findings, not providing a diagnosis.

Only later in October 2004, says Dr. Martindale, did he discover that plaintiffs' attorneys had listed *him* as the "diagnosing physician" in their asbestos and silicosis lawsuits. He learned this when he was asked by an asbestos defense attorney to submit to a deposition. Soon after, he received a call from Billy H. Davis, Jr., a plaintiff attorney in the Texas office of Campbell, Cherry, which had filed suits based on Dr. Martindale's work.

Dr. Martindale recounts this conversation in a later letter to Mr. Davis, a copy of which has landed with the feds:

"I was soon contacted by you [Mr. Davis]. You said you wanted to retain me as an expert witness before the deposition. I declined. During this conversation, I learned that you had cited me as the diagnosing physician in certain silicosis cases. I told you that I personally had made no diagnoses, that I had not examined any of the patients, and that I had only determined whether the readings were consistent with the disease previously diagnosed. Your response was *'I certainly would hate to hear you say that at your deposition.'*"

That's our emphasis, but wow. It sure sounds like coaching a witness not to blow the whistle on phony illness claims. It's true that, having been dragged into this investigation, Dr. Martindale has every incentive to suggest he was duped by lawyers and N&M. He profited handsomely from his alliance, raking in more than a quarter-million dollars from 2001 to 2002 for having looked at some 7,500 X-rays.

Yet assuming he's telling the truth, his testimony is illuminating. It raises the possibility that N&M provided legal language that allowed lawyers to claim that Dr. Martindale had provided them with diagnoses, even though that is not what Dr. Martindale had done. Why bother to do this? Well, one reason may have been that Dr. Harron had already submitted more than *50,000* asbestos diagnoses, and defendant companies were eyeing him suspiciously. Moreover, it might have raised alarms if Dr. Harron had provided both silicosis and asbestosis diagnoses for the same patients—a little too legally convenient, not to mention medically rare.

As for the plaintiff lawyers, Dr. Martindale's correspondence with Mr. Davis shows the attorney knew nearly a year ago that Dr. Martindale did not intend to stand by the supposed "diagnoses." Yet it is not clear that Mr. Davis has withdrawn any of his asbestos suits. We called Mr. Davis and a representative for N&M but were unable to reach them at deadline yesterday.

This is only one part of what looks to be an extensive Justice Department probe of asbestos and silicosis suits. The subpoena reveals that the grand jury was convened to examine the serious charges of conspiracy and fraud. Separate court records we've reviewed show that New York prosecutors have also met with representatives of G-I Holdings, an asbestos-plagued company that took the rare step of countersuing plaintiff attorneys—alleging everything from fraud to tampering with documents.

All of this is showing that the coterie of doctors, lawyers and screening companies behind the silicosis suits were also behind the bigger asbestos mess. Companies such as N&M helped generate X-rays for big asbestos law firms. And the Manville Trust, which has fielded nearly 700,000 asbestos claims, has found that a mere 15 doctors in the country were responsible for nearly 30% of its claimants. Dr. Harron is at the top of list.

To the extent that prosecutors are beginning to sort out how these folks conducted their "business," they are helping to police the courts of phony suits and throwing a light on what could turn out to be one of the biggest legal scams in U.S. history. We hope they keep digging.

Rule of Law / *by Lester Brickman*

What Did Those Asbestos X-Rays Really Show?

In the mid 1980s, court decisions dramatically enlarged insurance companies' liability for asbestos-related injury. At the same time, defendants and their insurers began to pay asbestos claims without demanding much in the way of proof of injury or liability. Plaintiffs' lawyers responded opportunistically.

As a consequence, asbestosis litigation, which had previously focused on malignancies and other debilitating injuries, shifted radically from the traditional model of an injured person seeking a lawyer to an entrepreneurial model. Lawyers spent millions to sponsor mass screenings of upwards of 750,000 industrial and construction workers. Of the 850,000 asbestos claimants that have so far brought suit against over 8,400 different defendants, about 600,000 have been recruited by these mass screenings.

Most of these 600,000 plaintiffs claim a mild form of asbestosis (a scarring of lung tissue), or other nonmalignant condition, but suffer no symptoms or lung impairment. They have no asbestos-related injury recognized by medical science and no significant probability of manifesting an asbestos-related malignancy in the future. Nevertheless, lawyers charging 40% contingency fees have extracted tens of billions of dollars in settlements, after hiring a comparative handful of doctors who consistently read X-rays and "diagnose" disease in 60% to 80% of those screened.

According to medical science, however, asbestosis is a "disappearing disease" and only 2% to 4% of claimants now generated by screenings have an actual nonmalignant condition resulting from asbestos exposure. This led me previously to conclude that the X-ray readings and "diagnoses" of these litigation doctors were a function of the millions of dollars paid to them by the lawyers. Overwhelming evidence in support of these conclusions about asbestos litigation has recently come to light in the not-unrelated litigation based on exposure to silica or sand.

Silicosis, like asbestosis, is a scarring of the lungs but is caused by the inhalation of large quantities of fine sand dust. Once a scourge, it is a disappearing disease because of strict government regulations and employer practices. Deaths attributable to silicosis have dropped over 80% in the past 30 years. But beginning in 2002, claim filings in state courts, mostly in Mississippi, reached "epidemic" proportions.

> *Peeling back the layers of a massive fraud.*

The reasons for the "epidemic" are that key states began to adopt comprehensive asbestos litigation reform and Congress took up consideration of a fund (paid for by defendants and insurance companies) to pay claims, as a way of taking asbestos litigation out of the tort system. Worried about the future of their enterprise, lawyers, doctors and screening companies abruptly shifted gears from ginning up claims based on asbestosis to claims based on silicosis. As one lawyer acknowledged, "why reinvent the wheel?"

This all became clear when 10,000 of the 35,000 pending silica claims were centralized into a federal multi-district litigation (MDL), presided over by U.S. District Court Judge Janis Jack, a Clinton appointee. During the course of the MDL, one of the doctors recanted all 3,617 of his diagnoses of silicosis, provoking Judge Jack to observe that "it's clear this . . . [diagnosing] business is fraudulent." She issued an unprecedented order allowing defendants to cross-examine, in her presence, every doctor who had provided a silicosis diagnosis, as well as the owners of the screening companies.

It turns out that 6,000 of the plaintiffs had previously filed asbestosis claims. Nevertheless, pulmonary experts testified at a U.S. Senate hearing that, while it was theoretically possible to have both asbestosis and silicosis, they had never seen a single dual disease case during their extensive practices. Moreover, many of the X-ray readings on which the silicosis diagnoses were based were made by the same doctors who had previously read the X-rays as "consistent with asbestosis"—but who had never mentioned silicosis.

Judge Jack concluded that "the lawyers, doctors and screening companies" were "all willing participants" in a "scheme [that] manufactured [diagnoses] for money"—the equivalent of a finding of pervasive fraud. If the same level of discovery were permitted in asbestos suits, I have no doubt of the outcome. The same screening companies, X-ray readers and diagnosing doctors excoriated by Judge Jack have been involved in asbestos litigation for almost 20 years. As Judge Jack observed, the "evidence of the unreliability of the [X-ray] reads performed for this MDL is matched by evidence of the unreliability of [X-ray] reads in asbestos litigation." The asbestos lawsuits have resulted in *billions* of dollars in settlements.

Sitting in Judge Jack's courtroom during the cross examinations was an assistant U.S. Attorney from the Southern District of New York. He was there because a federal grand jury had been convened in mid 2004 to consider possible criminal charges arising from claims of exposure to silica and asbestos, and the use of witness coaching techniques to implant false memories about product exposure.

Asbestos litigation, meanwhile, prevented the creation of 500,000 jobs because of the diversion of capital in over 70 asbestos-related bankruptcies. Plaintiff lawyers have exercised undue influence over the bankruptcy process, essentially obtaining ratification of the claim-generation process that Judge Jack condemned. Here too, the worm appears to be turning. In a series of decisions, the Third Circuit Court of Appeals, echoing the exact words I used to describe the ongoing Congoleum bankruptcy proceeding, stated that to approve a reorganization plan tainted by lawyers' engaging in conflicts of interest and securing preferential treatment for their clients to generate additional fees, "would be a perversion of the bankruptcy process."

The next shoe to drop may be in federal court in New York. If indictments are forthcoming—and lawyers who sponsored the mass screenings and collected billions of dollars in fees are among those indicted—the ensuing process could shine a floodlight on a fraudulent scheme so massive as to qualify non-malignant asbestos litigation for entry into the pantheon of such great American frauds as Enron, WorldCom, OPM, Crédit Mobilier and Teapot Dome.

Mr. Brickman is professor of Law at the Cardozo School of Law of Yeshiva University.

REVIEW & OUTLOOK

Screening for Corruption

The neutron bomb that federal Judge Janis Graham Jack dropped in June on runaway silicosis claims is still reverberating through the legal system, and to cleansing effect. On Capitol Hill, in a federal grand jury, and even in the courts themselves, subpoena power is beginning to expose the corruption that has underpinned both silicosis and asbestos litigation.

Subpoenas hit the asbestos litigation machine.

Most promising is the news that a federal grand jury in the Southern District of New York is looking into all this, sending subpoenas to doctors and screening companies that Judge Jack had cited for "manufacturing" silica claims for money. Many of these same doctors and companies, and the lawyers they worked with, were previously responsible for huge numbers of asbestos claims. Much of what a grand jury does is secret, but a few details are leaking out.

Among them is a recent court filing, in which one doctor involved in the Jack opinion, James Ballard (responsible for at least 11,000 asbestos diagnoses), has admitted he is a "subject" of a "criminal" grand jury proceeding. He and another asbestos diagnoser—Dr. Ray Harron—are already lawyered up and asserting their Fifth Amendment rights. Yet another physician, George Martindale, has sent documents to the grand jury suggesting that trial lawyers misused his work in court, as well as encouraged him to shut up about certain details in his deposition.

Judge Janis Graham Jack

And then there are the courts, which up to now have refused to probe individual asbestos claims. Yet recently, federal bankruptcy Judge Judith Fitzgerald allowed W.R. Grace to send detailed questionnaires to all of its 118,000 asbestos claimants, seeking information about their doctors and prior legal claims. W.R. Grace specifically cited the fraud uncovered by Judge Jack as grounds for this discovery.

Other bankrupt firms, such as USG, have made similar requests, again citing the Jack opinion. In Philadelphia, in federal litigation with as many as 200,000 claims, defendant companies have sent subpoenas to as many as 45 doctors and 12 screening companies. And in the Congoleum bankruptcy in New Jersey, insurance companies are outright contesting thousands of asbestos claims as frauds. These insurers have noted that the claims were diagnosed by the same doctors and screening companies, and filed by the same law firms, as in Judge Jack's discovery.

Even Congress is finally getting in on the act, with House Republicans Joe Barton and Ed Whitfield probing the key players in the Jack litigation. Mr. Whitfield's subcommittee recently voted 11-0 to authorize subpoenas to at least four doctors. To date, none of the doctors has supplied the requested documents; some are citing constitutional privileges. The committee is considering its next steps.

Subpoenas aside, the Jack findings are already having a practical effect on whether claims will be paid. The largest asbestos trust fund, the Manville Trust, in September barred nine doctors and three X-ray screening companies (most involved in the Jack opinion) from submitting further diagnoses. Some of those barred had been among the most prolific asbestos-diagnosing physicians in the country.

Dr. Harron, for instance, has provided medical reports in support of 76,224 individual Manville Trust claimants. Another physician involved in the Jack silicosis cases, Jay Segarra, contributed more than 23,000 Manville claims. Manville has been also asked to turn over documents from its wealth of information to the New York grand jury.

All of this is making plaintiffs attorneys sweat, and no wonder. While much of the subpoena focus has been on doctors and screening companies, the trail is increasingly leading to the law firm door. When Judge Jack asked one plaintiffs lawyer how it was that nearly 70% of his *silicosis* clients had previously filed asbestos claims (given it is extremely rare to have both silicosis and asbestosis), he replied that he believed their prior *asbestos* claims had been bogus. According to defense attorneys, some of those claims happened to have been filed by lions of the asbestos bar, including Dickie Scruggs. You can bet New York prosecutors were taking notes.

This blame-shifting may explain why the tort bar has already changed its public-relations strategy from denial to crisis management. In a recent article in Business Week, asbestos kingpin Fred Baron was quoted as saying that in any 100,000 asbestos claims there will be "some small number" that are "fraudulent." In other words, he's willing to believe that some fraud did take place, but it was committed by someone else. Mr. Baron also reverted to the old standby of demonizing corporations, saying that defendant companies were encouraging the criminal and Congressional probes in order to "game the system." But gaming the courts is precisely what the asbestos bar has done for years.

All of which suggests Congress should put on hold any vote to create a new $140 billion asbestos trust fund. Before any companies are forced to pay out billions of dollars, we all deserve to know how many claims are real. And anyone found to have knowingly submitted false ones should take responsibility for the more than 70 bankruptcies that have so far accompanied the litigation flood.

As for Judge Jack, aside from judicial plaudits, we have another suggestion. Federal Judge Charles Weiner of Philadelphia, who had been presiding over tens of thousands of asbestos cases in multidistrict litigation, regrettably died last month. Since just about any judge can preside over such litigation, how about Judge Jack as a replacement? The judiciary couldn't do better than to keep this asbestos and silicosis sheriff on the beat.

REVIEW & OUTLOOK

Beware the B-Readers

Of all the unsavory details rolling out of investigations into the silicosis and asbestos scams, some of the ugliest concern doctors who abandoned their ethics to cash in. Even more disturbing is the growing evidence that what has allowed them to get away with this is a federal certification program.

How doctors have used X-rays to abet courtroom asbestos fraud.

That's why a coalition of industry and other groups has began pushing the National Institute for Occupational Safety and Health (Niosh) to start policing its "B-reader" program, which certifies doctors to read X-rays. The federal agency proposed new ethics rules in November, after a federal judge slammed several government-certified doctors who had ginned up sham diagnoses in a silicosis suit. But Niosh needs to go much further to clean up this corrupt corner of American medicine.

Niosh's B-reader program started in the 1970s, as the government tracked coal workers with black lung disease. Niosh was concerned about the competence of doctors reading chest X-rays, so it began a training course and test. Those who pass become known as "B-readers." By all accounts the test is difficult; pass rates can hover around 50%, a number that's even lower for recertification. Over time the program has certified some 1,200 B-readers, of which there are more than 500 today.

Most of these professionals perform valuable roles in the occupational-hazard world. But a growing number of B-readers are now leveraging their credentials to abet fraudulent litigation. These doctors churn out staggering numbers of X-ray "readings" that purport to find diseases such as asbestosis and silicosis—readings that are then seen to come with a "government stamp of approval." Their standing is so high that litigators often forward their work as proof of a diagnosis, even though the medical world universally agrees that X-rays alone never prove a serious illness. In short, a program designed to raise standards has been hijacked for the opposite purpose.

* * *

Reading any X-ray is tricky, and studies show there is a 30% variance in how even honest doctors read the same chest film. Yet the B-readers who've hired themselves out to lawyers have proven that their work has little to do with medicine.

In a 2004 study published in the journal Radiology, Johns Hopkins researchers obtained 492 chest X-rays that had been used in asbestos litigation. They then had these same X-rays examined by six independent B-readers, none of whom were told what the original interpretations had been, or even that the X-rays had been used in litigation. The initial (lawyer-retained) B-readers had found that 96% of the cases revealed abnormalities. The independent panel found 4.5%.

Niosh has also found amazing disparities. One famous example involved a tort bar scheme called the National Tire Workers Litigation Project, which sent doctors around the country in mobile X-ray vans to screen rubber workers for asbestosis. Information distributed to tire workers stated that 64% of those screened at one location had shown positive for asbestosis, and 94% at a second location. Yet when Niosh had an independent panel evaluate X-rays of tire workers most at risk for the disease, it found asbestosis in 0.2%.

What kicked off this recent scrutiny of B-readers was Texas federal Judge Janis Graham Jack's withering decision in a giant silicosis suit last July, in which she found that doctors had been "manufacturing" claims for money. Of the seven physicians she singled out for special criticism, five were Niosh-certified B-readers. Some of these doctors simply signed diagnosing language provided to them by others. Some did not write, read or sign their own reports. More than 6,000 of the 10,000 silicosis plaintiffs had also filed asbestos claims, despite the medical rarity of having both diseases; sometimes the same doctor had signed both reports.

None of this is surprising considering these "doctors" have become little more than experts-for-hire. Certain B-readers long ago came to understand that their government-issued credentials made them valuable in court, and therefore worth a lot of money. Many doctors are paid more if they find a disease than if they don't. Dr. Ray Harron, a key figure in silicosis-asbestos diagnoses, made an estimated $5 million for his work for one screening company.

* * *

In a better world, these doctors would have been stopped long ago by state medical boards, which are supposed to enforce medical standards. These bodies have come in for a lot of deserved criticism of late for their reluctance to discipline these doctors, yet so far have shown no signs of cracking down.

Another possibility is greater involvement by professional bodies, although that has its limits. The current ethics committee chair for the American College of Radiology, Dr. Leonard Berlin, tells us that even if the college has real evidence of wrongdoing, the most it can do is "either suspend or revoke their membership. It doesn't stop them from practicing."

Which gets back to Niosh. The agency's new ethics rules are a good start, particularly as they are aimed at B-readers involved in litigation. But the outside commentators are on to something when they suggest that Niosh also audit doctors who receive its government-sanctioned credentials. The agency already conducts an audit program for respirator devices, and a similar one could be set up for B-readers. It might start by investigating the X-rays that Judge Jack still has in her court document depository.

If Niosh isn't willing to audit, perhaps it should abolish the B-reader program altogether. Other countries have managed to turn out qualified X-ray readers without such special credentials. But certainly the last thing we need is for the federal government to keep blithely providing yet more "expert witnesses" to corrupt the court system.

Trial Bar Cleanup

It's amazing what a little courage from the bench can do to clean up the justice system. Now that word is out that most silicosis lawsuits are shams, ever more judges are helping to expose the corruption.

The latest is Florida state Judge David Krathen, who in a recent hearing rebuked plaintiffs lawyers for inventing silicosis suits, and declared "mind-boggling" the effect that phony suits were having on the "economic well-being of this country." He vowed to ride herd on the claims in his court, separating the good cases from the fake.

'Reeks from fraud' ... 'bilking our society.'

This isn't the way trial lawyers are used to being treated, and credit for this tougher approach goes in part to Texas federal Judge Janis Graham Jack. Judge Krathen made specific reference to the litigation Judge Jack presided over last year, in which she exposed how lawyers, doctors and X-ray screening companies had "manufactured" some 10,000 bogus silicosis suits "for money."

Of the 10,000 suits that Judge Jack sent back to state courts, more than half have already been dismissed—often at the request of the lawyers who first filed them. Even the wizards of the plaintiffs bar are wary of re-entering court sporting discredited doctors and screening companies, many of which are now the focus of federal and Congressional investigations. Separate silicosis suits have also been dismissed in Ohio.

Those plaintiffs attorneys who continue to roll the dice are having to resort to ever more desperate practices. In the Florida case, lawyers rushed to file most of their claims the day before a new state statute curbing asbestos and silicosis suits took effect. They also filed all 111 in Broward County, which is notoriously friendly to the trial bar—or at least it was until they met Judge Krathen, a former trial attorney himself.

The judge allowed defense attorneys to present what they'd uncovered so far about those 111 claims. The stunner was that 72% of the plaintiffs had filed both asbestosis and silicosis suits—despite the medical rarity of having both ailments. Defense lawyers also noted that one of the X-ray screening firms (N&M) singled out in Judge Jack's courtroom also had a role in the Florida suits.

When a trial lawyer defended the practice of driving mobile X-ray vans to do mass screening, Judge Krathen cut him off, noting that N&M "reeks from fraud." He went on to say: "I'm offended, and I've practiced law for 30 years and now on the bench for three years, that lawyers resort to drive-up buses or vans, unmarked, to sit there, and it looks like ... are involved in bilking our society and our institutions out of money for no valid reason."

The judge has since ordered the trial lawyers to pony up fact sheets about their clients. These questionnaires are arguably the most detailed a judge has ever requested in such a suit, demanding not only exhaustive information about plaintiffs' diagnoses, but specifics about any prior asbestos lawsuits.

Judge Krathen also took aim at the plaintiffs lawyers' scattershot approach to naming defendant companies—80 in all—and demanded that their clients start identifying specific products that supposedly caused them harm. This was after a lawyer representing a construction-related firm called Vulcan Materials told the judge that while his company had been named in 17,000 claims, its products had only been positively identified by plaintiffs in 23. The lawyer estimated it can cost Vulcan up to $17,000 to get dismissed from a case.

The judge summed things up this way: "In the years I've practiced law, the toughest time was getting a good legitimate case bought into by the jury because of all the horrible publicity that comes out from the negative kind of stuff that goes on in [the Jack suit]... I'm concerned about the good clients, the good cases, and I'm concerned about the economic well-being of our economy and our companies that support jobs here in the U.S. . . I want this information [about patients and products] up front."

That's the sort of fair-minded approach that has unfortunately been missing from judges in the many years that the asbestos and silicosis blobs have been destroying honest companies and clogging courtrooms. It's good to see a few more judges standing up to the trial bar's transparent corruption.